Definitions:

(71) "Water Quality Standards Variance," or "variance" means a time-limited ~~alternate~~ designated use and parameter-specific criteria that applies to a specified permitted discharger or group of specified permitted dischargers, that reflects the highest attainable condition during the term of the variance.

340-041-0059

Variances

To view the multiple discharger variance for Willamette basin dischargers for mercury see OAR 340-041-0345(6).

(1) Applicability. Subject to the requirements and limitations set out in sections (2) through (9) below, a point source may request a water quality standards variance where it is demonstrated that the ~~source~~ waterbody cannot meet its underlying designated use and criterion because the permittee subject to the variance cannot feasibly meet effluent limits sufficient to meet water quality standards.

(a) The variance applies only to the ~~specified permittee (s) or waterbody/waterbody segment/point source permit(s)~~ and pollutant(s) specified in the variance; the underlying ~~water quality standard(s) and~~ designated use and criterion addressed by the variance are retained, and all other applicable water quality standards not specifically addressed by the variance ~~(s) otherwise~~ remains in effect.

(b) The department or commission ~~may~~ shall not grant a variance if:

(A) The effluent limit sufficient to meet the underlying ~~water quality standard~~ designated use and criterion addressed by the variance can be attained by implementing technology-based effluent limits required under sections 301(b) and 306 of the federal Clean Water Act; or

(B) The variance would likely jeopardize the continued existence of any threatened or endangered species listed under section 4 of the Endangered Species Act or result in the destruction or adverse modification of such species' critical habitat; or

(C) The conditions allowed by the variance would result in an unreasonable risk to human health.

(2) Types of variances. The following types of variances ~~to water quality standards~~ may be established:

(a) The director may ~~issue~~ adopt a ~~rule establishing~~ an individual variance to a specified permitted discharger. The ~~temporary~~ variance ~~standard(s)~~ only applies at the point(s) of ~~compliance~~ discharge for the individual facility.

(b) The commission may adopt a ~~rule establishing a~~ multiple discharger variance, which applies to multiple permitted discharge facilities as defined within the scope of the rule.

(c) The commission may adopt a ~~rule establishing~~ a water body variance, which is a time limited ~~alternate~~ designated use and parameter-specific criteria ~~change~~ that applies to the waterbody and all ~~qualified~~ dischargers within the defined water body or water body segment.

Commented [A1]: Suggest criterion (singular), but up to ODEQ if you want to leave it plural.

Commented [A2]: Waterbody variances are referred to in 2(c), so suggest revising to say "that applies to a specified permitted discharger(s) or waterbody/waterbody segment that reflects…"

Commented [A3]: General comment throughout: consistency of "state/department/commission" and "adopt/grant/establish." Also if different rules apply for different types of variances the differentiation needs to be clearly spelled out, and why there is a difference.

Commented [A4]: May want to cite more generally to a different section where all state-adopted variances will be codified, so this section does not have to be amended each time a new variance is adopted. I.e: For all basin specific variances see OAR 340-XXXX

Commented [A5]: May want to consider if this language pertains to waterbody variances as well. If not consider adding a section pertaining to waterbody variances applicability or changing the wording to "the state may adopt"

Commented [A6]: May want to add in waterbody/waterbody segment to clarify that a waterbody variance can be adopted. Language is only a suggestion. As mentioned above, this could also be included in a separate section on the applicability of WB variances.

Commented [A7]: There are two points to be made here: 1) the underlying WQS are retained and 2) all other WQS (not subject to the variance) remain in effect.

Commented [A8]: Suggest "shall not" or "will not" here.

Commented [A9]: Variances only apply to designated use and criterion, not to antidegradation, so it is incorrect to say WQS

Commented [A10]: Suggest deleting B and C.

Commented [A11]: Not sure if this is correct or not in OR that the Director can adopt a rule. But regardless of if the variance is an individual or multi discharger or waterbody it is considered a rule that must be adopted by the state and approved by EPA. Please explain how the state laws differ between the types of variances.

Commented [A12]: This should be "at the point of discharge" because point of compliance is a permitting term.

Commented [A13]: This seems to read like a definition for a waterbody variance. The definition above should cover waterbody variances and then this section can read similar to a and b.

(3) Conditions to Grant a Variance. Before the commission ~~or department may grant~~ may adopt a variance, it must determine that:

(a) The requirements that apply throughout the term of the water quality standards variance will not result in any lowering of the currently attained ambient water quality, unless the variance is needed for restoration activities as specified in (3)(b)(G) below; and

(b) Attaining the ~~water quality standard~~designated use and criterion during the term of the variance is not feasible for one or more of the following reasons:

(A) Naturally occurring pollutant concentrations prevent the attainment of the use;

(B) Natural, ephemeral, intermittent, or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges to enable uses to be met without violating state water conservation requirements;

(C) Human-caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place;

(D) Dams, diversions, or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the waterbody to its original condition or to operate such modification in a way which would result in the attainment of the use;

(E) Physical conditions related to the natural features of the waterbody, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or

(F) Controls more stringent than those required by sections 301(b) and 306 of the federal Clean Water Act would result in substantial and widespread economic and social impact.

(G) Actions necessary to facilitate lake, wetland, or stream restoration through dam removal or other significant reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented.

(4) Variance Duration.

(a) The duration of a variance must only be as long as necessary to meet the highest attainable condition as described in section (6) of this rule. If the term of the variance exceeds five years, DEQ will reevaluate the highest attainable condition using all existing and readily available information at least every 5 years. DEQ will specify in the variance how the State intends to obtain public input on the reevaluation. The results of such reevaluation must be submitted to EPA within 30 days of completion of the reevaluation.

Each variance will also contain a provision that the WQS variance will no longer be the applicable water quality standard for purposes of the Act if the State does not conduct a reevaluation consistent with the frequency specified above or the results are not submitted to EPA as required above.

(b) When the duration of the variance is less than the term of a NPDES permit, the permittee must be in compliance with the specified effluent limitation sufficient to meet the underlying water quality standard upon the expiration of the variance.

Commented [A14]: Flagging for consistency in terms "adopt/grant." Grant, established, and adopt can all be okay as long as they are consistent and know that the variance must be legally binding, we must have an AG cert and that EPA must approve it. Establishing it only in permits is not sufficient. Only the GLI can do that as it was set up differently.

Commented [A15]: Or just remove the word "and".

Commented [A16]: Just for context of what this would need to look like in practice, the preamble to 131.14 at page 51040 states:
Some commenters questioned what would happen if a state or authorized tribe does not coordinate a WQS variance term with the expiration date of an NPDES permit. If information is available to the permitting authority indicating that the term of a WQS variance will end during the permit cycle, the permitting authority must develop two WQBELs: one WQBEL based on the highest attainable condition applicable throughout the WQS variance term, and another WQBEL based on the underlying designated use and criterion to apply after the WQS variance terminates. Including two sets of WQBELs that apply at different time periods in the permit ensures that the permit will derive from and comply with WQS throughout the permit cycle. If the state or authorized tribe adopts and EPA approves a subsequent WQS variance during the permit term to replace an expiring WQS variance, the new WQS variance would constitute "new regulations" pursuant to § 122.62(a)(3)(i), and the permitting authority could modify the permit to derive from and comply with the subsequent WQS variance. At the request of the permittee, the permitting authority can also utilize the Permit Actions condition specified in § 122.41(f) to modify a permit and revise the WQBEL to reflect the new WQS variance.

(c) A variance is effective only after EPA approval. The duration of the variance ~~will~~ must be specified in ~~an NPDES permit, order or~~the adopted and approved rule of the department or commission.

(5) Variance Submittal Requirements. To request a variance, a permittee must submit the following information to the department:

(a) A demonstration that attaining the ~~water quality standard~~designated use and criterion for a specific pollutant is not feasible for the requested duration of the variance based on one or more of the conditions found in section (3)(b) of this rule;

(b) A description of treatment or alternative options considered to meet limits based on the applicable underlying ~~water quality standard~~designated use and criterion, and a description of why these options are not ~~technically, economically, or otherwise~~ feasible based on the demonstration as described in 5(a);

(c) Sufficient water quality data and analyses to characterize ambient and discharge water pollutant concentrations;

(d) Identification and documentation of a~~A~~ny cost-effective and reasonable best management practices for nonpoint sources ~~under the control of the discharger that addresses~~related to the pollutant or water quality parameter (s) and waterbody or waterbody segment(s) ~~the variance is based upon~~specified in the variance that could be implemented to make progress towards attaining the underlying designated use and criterion. The state will provide public notice and comment for any such documentation;

(e) A proposed pollutant minimization plan that includes ~~any~~ actions to be taken by the permittee(s) subject to the variance that would result in ~~reasonable~~ progress toward ~~meeting~~ achieving the ~~underlying water quality standard~~ highest attainable condition. Such actions may include proposed pollutant offsets or trading or other proposed pollutant reduction activities, and associated milestones for implementing these measures. Pollutant minimization plans will be tailored to address the specific circumstances of each facility with the objective of reducing pollutant levels to the extent feasible; and

(f) If the discharger is a publicly owned treatment works, a demonstration of the jurisdiction's legal authority (such as a sewer use ordinance) to regulate the pollutant for which the variance is sought. The jurisdiction's legal authority must be sufficient to control potential sources of that pollutant that discharge into the jurisdiction's sewer collection system.

(6) Highest Attainable Condition. The highest attainable condition will be a quantifiable expression of one of the following:

(a) For discharger(s)-specific WQS variances:

(A) The highest attainable interim criterion; or

(B) The interim effluent ~~concentration condition~~ that reflects the greatest pollutant reduction achievable; or

(C) If no additional feasible pollutant control technology can be identified, the interim criterion or interim effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a pollutant reduction plan.

Commented [A17]: Would the state want to consider renaming this section as "Variance Supporting Documentation-documentation required to demonstrate the need for a variance." and then specify that for a SDV/MDV the discharger must submit XYZ. That might help to avoid confusion about waterbody variances?

Commented [A18]: Suggest deleting this for clarity or change to "at least one". We all understand that a variance can have supporting factors as long as one can stand on its own.

Commented [A19]: The demonstration could be for something other than technological or economic infeasibility

Commented [A20]: In the federal regs, this is only needed for waterbody variances, and in that case not "under the control of the discharger." OR can require more than the fed regs and in that case this can stay as it is. However, if this language is intended for waterbody variances the changes must be made and it should be clarified as such. One suggestion could be for a separate section on WB variances or moving this down to the last item in the section and preface the section with something like: "In addition to paragraphs (a) through (f) of this section, for a WQS variance that applies to a waterbody/waterbody segment:"

Commented [A21]: Does OR intend to require a PMP for all dischargers regardless of what HAC is being used? This is common in many states. Because the fed regs only require a PMP for HAC3 those PMPs need to have additional requirements.

All PMPs for HAC3 need to correspond to the timeframe of the variance as the timeframe is based on the time it would take to implement those PMP activities.

Commented [A22]: This edit is to allow the state flexibility to articulate the HAC in a form other than concentration.

Commented [A23]: Suggested edit to give more flexibility. However, the state can be more restrictive and only do "interim effluent condition".

Commented [A24]: Should either use the same term as the federal regs or add a definition that parallels the definition whereby saying that a PMP and a PRP mean the same thing.
Reminder , in the context of § 131.14, a Pollutant Minimization **Program** is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.

(b) For WQS variances applicable to a water body or waterbody segment:

(A) The highest attainable interim use and interim criterion; or

(B) If no additional feasible pollutant control technology can be identified, the ~~effluent condition~~ interim use and interim criterion that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a pollutant reduction plan.

(c) The requirements of the variance are either the highest attainable condition identified at the time of the adoption of the variance, or the highest attainable condition later identified during any reevaluation consistent with section 4(a) of this rule, whichever is more stringent.

(7) Variance Permit Conditions. Variance conditions in the discharger's permit will be based on the highest attainable condition and not the underlying water quality standard, so long as the variance remains in effect~~ive~~. The department must establish and incorporate into the discharger's NPDES permit all conditions necessary to implement and enforce an approved variance and associated pollutant reduction plan. The permit must include, at a minimum, the following requirements:

(a) An interim permit limit or requirement representing the highest feasibly attainable effluent condition. Any permit limit must be no less stringent than that achieved under the previous permit. For a new discharger, the permit limit will be calculated based on best achievable technology;

(b) A requirement to implement any pollutant reduction actions approved as part of a pollutant reduction plan submitted in accordance with section (4)(e) above and to make reasonable progress toward attaining the underlying water quality standard(s);

(c) Any studies, effluent monitoring, or other monitoring necessary to ensure compliance with the conditions of the variance; and

(d) An annual progress report to the department describing the results of any required studies or monitoring during the reporting year and identifying the reduction activities completed, and any impediments to reaching any specific milestones stated in the variance.

(8) Public Notification Requirements.

(a) If the department proposes to grant a variance, it must provide public notice of the proposal and an opportunity for public comment. The public notice may be included in the public notification of a draft NPDES permit or other draft regulatory decision that would rely on the variance;

(b) The department will publish a list of all variances approved by EPA pursuant to this rule. Newly approved variances will be added to this list within 30 days of their effective date. The list will identify: the discharger; the underlying ~~water quality standard~~designated use and criterion addressed by the variance; the pollutant(s) or water quality parameter(s) to which the variance applies; the waters ~~of the state~~ to which the variance applies; the effective date and duration of the variance; the highest attainable condition specified in the variance; and how to obtain additional information about the variance.

(9) Subsequent WQS Variance~~s Renewals~~.

Commented [A25]: It is inconsistent with fed rules to allow an effluent condition for a waterbody variance.

Commented [A26]: Should either use the same term as the federal regs or add a definition that parallels the definition whereby saying that a PMP and a PRP mean the same thing.
Reminder , in the context of § 131.14, a Pollutant Minimization **Program** is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.

Commented [A27]: Only the language not highlighted (so the first two sentences of this section) was reviewed. The highlighted portion is permit implementation language not covered by 303(c). It is fine to leave the language in document for clarity.

Commented [A28]: The public notice of a variance must go through the public rulemaking process just like any other water quality standard, including a public hearing. All public participation on a variance must meet Part 25.5, which requires a hearing which is not normally required when public noticing permits. So, while the public notice of a variance can be combined with that of the NPDES permit, the state must (1) still conduct a public hearing and meet 25.5 and (2) cannot finalize the NPDES permit incorporating the variance until EPA has approved the variance.

131.14 states: Such a WQS variance is subject to the provisions of this section and public participation requirements at §131.20(b).

131.20(b) states: *Public participation.* The State shall hold one or more public hearings for the purpose of reviewing water quality standards as well as when revising water quality standards, in accordance with provisions of State law and EPA's public participation regulation (40 CFR part 25). The proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing.

Commented [A29]: Do you plan to have this list be an appendix to the WQS that can be updated? If not, where will the list be published? Just wanted to clarify as well that "approved pursuant to this rule" means approved by EPA. See suggested edit.

Commented [A30]: Variances cannot be "renewed," but a subsequent variance can be issued. Not sure if this section is needed, as any subsequent variance must meet the requirements of 131.14 (i.e. there is no shortcut) so everything should just reference the requirements above for variance requirements. However, it is up to the state if wanted for clarity.

(a) A subsequent variance may be ~~renewed~~ adopted if:

(A) The permittee makes a ~~renewed~~ demonstration pursuant to section (2) of this rule that attaining the water quality standard continues to be infeasible,

(B) The permittee submits any new or updated information pertaining to any of the requirements of section 4,

(C) The department determines that all conditions and requirements of the previous variance and actions contained in the pollutant reduction plan pursuant to section (5) have been met, unless reasons outside the control of the discharger prevented meeting any condition or requirement, and

(D) All other requirements of this rule have been met, including public notice procedures.

(b) A~~n~~ subsequent individual variance ~~renewal~~ must be approved by the department director and by EPA.

(c) The ~~renewal of a~~ subsequent multiple discharger variance or waterbody variance must be approved by the commission and by EPA.

Statutory/Other Authority: ORS 468.020, 468B.010, 468B.020, 468B.035 & 468B.110

Statutes/Other Implemented: ORS 468B.048

History:

DEQ 10-2011, f. & cert. ef. 7-13-11

Commented [A31]: Only discharger specific variances? Or waterbody variance as well? If both, could just say "A demonstration is made…."

Commented [A32]: Section 2 is "types of variances." I think you may have meant section 3 – Conditions to grant a variance?

Commented [A33]: This section is variance duration. Is that what was meant here? Or maybe it's supposed to be section 5 Variance submittal requirements or section 6 HAC?

Commented [A34]: As mentioned above, please explain why an individual variance does not have to go through the EQC, as it is a rulemaking.

340-041-0345

Basin-Specific Criteria (Willamette): Water Quality Standards and Policies for this Basin

(6) Multiple Discharger Variance for Mercury. The following procedures describe the application process and requirements for permitted wastewater discharge facilities to qualify for a water quality standards variance for the human health criterion for mercury. These procedures only apply to facilities that hold individual permits to discharge wastewater to waters of the Willamette River Basin.

(a) Findings. The Department finds the following:

(A) The human health criterion for mercury cannot be attained in the waters of the Willamette Basin in the next 20 years because human-caused sources of mercury from global mercury emissions and erosion of native soils are deposited or transported to Willamette Basin waters. These mercury sources are outside the control of Oregon dischargers or the state and cannot be remedied during the next 20 years;

(B) There is no currently feasible mercury treatment technology that would result in achieving the wastewater effluent;

Commented [A35]: Overall no way to provide constructive comments on this section since missing all substantive analyses/demonstration to inform the review. Minimal comments have been made on this section as more information is need to inform the decisions/justifications made within this section. EPA will review thoroughly once we receive the required information.

Commented [A36]: These findings are not substantiated in this document so they cannot be reviewed nor commented on.

Commented [A37]: No justification provided

Commented [A38]: No justification provided

(C) It would cause more environmental harm to install and operate advanced treatment technology to remove additional mercury than to reduce mercury through implementation of a mercury minimization plan. This finding does not affect any requirement that would result in installation of advanced technology to address pollutants other than mercury.

(b) Term of the variance. The term of this variance is 20 years from the date of EPA approval.

(c) Application requirements. To qualify for the variance, a facility must provide the following information

(A) A letter stating that they are applying for the mercury variance under this rule.

(B) All mercury effluent data from the previous five years. At least two years of quarterly effluent data is required to receive coverage under the variance.

(C) A mercury minimization plan, as described in 340-041-0345(6)(d)(B).

(d) Highest attainable condition. Permit requirements will reflect the highest attainable condition for this variance. The highest attainable condition consists of the following elements:

(A) The level currently achievable, which is the numeric expression of the effluent condition achievable with the pollutant control technologies installed by the facility, when those facilities are well maintained and operated.

(B) A mercury minimization plan, tailored to each individual facility and covering the term of the variance, with the following minimum elements:

(1) A monitoring plan to include influent, effluent and biosolids monitoring.

(2) Mercury reduction activities to be implemented throughout the term of the variance.

At a minimum, Tthese activities should incorporate the following:

(A) For municipal facilities, mercury reduction activities should address potential mercury sources from dental offices, medical facilities, schools, and other laboratories, as well as other known sources in the service area.

(B) For industrial facilities, mercury minimization activities should address mercury containing materials used in the facility's manufacturing process, as well as testing laboratories and other known mercury sources.

(3) Annual reporting to include all mercury data collected and a summary of mercury minimization activities completed within the previous year.

(f) Public notice. DEQ will provide public notice and opportunity for comment for a request for authorization under this variance together with the opportunity for comment on the draft permit.

(g) Re-evaluation of the Highest Attainable Condition. DEQ will re-evaluate the highest attainable condition for this multiple discharger variance no less frequently than every five years from the date that EPA approves this variance, and DEQ will provide a written summary of this reevaluation to EPA.

(A) The re-evaluation will include the following elements:

Commented [A39]: No justification provided

Commented [A40]: No justification for why this is reasonable

Commented [A41]: How defining this? Where are datasets for different types of plants and requirements for determining HAC

Commented [A42]: Since there are many different treatment plants how will each plant be reviewed to ensure there is not additional feasible pollutant reductions that can be made and that this HAC is the actually valid for each?

Also need to see the evaluation that explains why this is the most appropriate HAC.

Also need to state exactly how the LCA will be calculated.

Commented [A43]: The state must identify the facilities it knows needs coverage in rule. Where it doesn't have the data, the state can adopt eligibility criteria. But, to meet the federal reg requirements to identify the dischargers subject to the variance, they could identify a list of potential facilities along with the eligibility criteria that the state would use. EPA would then approve that list of potentials and eligibility criteria after they put those through a full public hearing process (like with any WQS adoption). Then the state would determine which of the "potentials" are actually eligible during the permit process and EPA would use its permit objection oversight authority to make sure that they were only incorporating variances where the eligibility criteria were met.

Commented [A44]: According to 131.14 (b)(v) For a WQS variance with a term greater than five years, a specified frequency to reevaluate the highest attainable condition using all existing and readily available information and **a provision specifying how the State intends to obtain public input on the reevaluation.** Such reevaluations must occur no less frequently than every five years after EPA approval of the WQS variance and the **results of such reevaluation must be submitted to EPA within 30 days of completion of the reevaluation.**

Updates to this section are needed to be in accordance with federal regulations.

(1) A summary of the mercury reduction activities completed and an analysis of mercury reductions achieved by facilities covered under this variance using the data and information provided in their annual reports; and

(2) Determination of the feasibility of mercury control technology to attain the water quality standard.

(B) DEQ will provide the opportunity for public comment on the re-evaluation prior to submitting it to EPA.

Commented [A45]: Mores specifics are needed here.

(C) Upon permit renewal for each facility covered under the variance, DEQ will update conditions in the permit based on the re-evaluation of the Highest Attainable Condition including the following:

(1) DEQ will re-calculate each facility's level currently achievable, as described in 340-041- 0345(6)(d)(A), utilizing the previous five years of data provided by each facility, at the time of their permit renewal.

(2) DEQ will review updates to the facility's mercury minimization plan.

(3) An opportunity for public comment will be provided with the opportunity for comment on the draft permit.

Statutory/Other Authority: ORS 468.020, 468B.030, 468B.035 & 468B.048

Statutes/Other Implemented: ORS 468B.030, 468B.035 & 468B.048

History:

DEQ 38-2018, minor correction filed 04/02/2018, effective 04/02/2018

DEQ 2-2007, f. & cert. ef. 3-15-07

DEQ 17-2003, f. & cert. ef. 12-9-03